Supreme Court, U.S.
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No. 00-135

In the

Supreme Court of the United States

KEELEY TATSUYO HUNTER, a minor,
by GINA F. BRANDT, her mother and next friend,
Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and THEODORE R. MITCHELL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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9pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. NO PAST RESEARCH FOUND THAT ETHNICITY CAN BE CORRELATED TO RESPONSE TO EDUCATIONAL APPROACHES 1

II. THE NINTH CIRCUIT HOLDING IS NOT LIMITED TO A UNIVERSITY-RUN RESEARCH SCHOOL 3

III. THE LOWER COURTS FOUND THAT DIFFERENT LEARNING STYLES WERE RACE-BASED 4

IV. THE STATE MAY STUDY BUT NOT AWARD BENEFITS BASED ON RACIAL DIFFERENCES 5

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998) 3

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.6, Petitioner Keeley Tatsuyo Hunter files this reply to the Opposition to Petition for Writ of Certiorari (Opposition) filed by Respondents Regents of the University of California and Theodore Mitchell in order to address new points raised therein.

I

NO PAST RESEARCH FOUND THAT ETHNICITY CAN BE CORRELATED TO RESPONSE TO EDUCATIONAL APPROACHES

Respondents seek to justify the race quotas in issue by raising the following new point: "Because past research has indeed found that ethnicity can be correlated to response to educational approaches, App. [Appendix] A:31 fn.19, researchers must determine that their results are valid with respect to all ethnic groups as well as be able to study the reasons for those correlations." Opposition at 4.

Respondents' citation is to the dissenting opinion of Judge Beezer which directly contradicts Respondents' premise. Judge Beezer found:

> Appellees [Respondents] appear to believe that a child's race and ethnicity is somehow linked to a distinct "learning style," [footnote omitted] and that these supposed cognitive differences between the races call for study. *However, none of appellees' evidence concretely demonstrated the existence of an ineluctable connection between any particular race/ethnicity and any particular "learning style."* Fn. 19.

App. A:31 (emphasis added).

Footnote 19 further clarifies the matter:

> The district court did not make a specific finding on this discrete question. The closest it came was to make the undifferentiated statement that an ethnically diverse student population presents "issues and challenges [that] include[] limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values and racial and ethnic conflict among families. *Hunter*, 971 F.Supp. at 1328-29. To the extent that this statement could be construed as containing a finding of fact that any particular race/ethnicity is inextricably linked to any particular "learning style," such a finding is, on this record, clearly erroneous. More broadly, the "premise that differences in race . . . reflect real differences . . . is utterly irrational and repugnant to the principles of a free and democratic society." *Metro [Broadcasting, Inc. v. Federal Communications Commission,]* 497 U.S. [547] at 618 [1990] (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) (internal quotation marks omitted).

App. A:31-32 n.19 (brackets in original).

The authority cited by Respondents makes clear that no research has found that ethnicity can be correlated to the response to educational approaches.

Respondents misunderstand Petitioner's position in claiming that the Ninth Circuit was required to apply a deferential standard of review under Federal Rule of Civil Procedure 52(a) to the district court's findings on the propriety of racial quotas. Opposition at 28. What Petitioner objects to is the Ninth Circuit's deference to Respondents on this constitutional issue.

> Finally, in evaluating whether UES's use of race/ethnicity in its admissions process is narrowly tailored, we recognize, as did the district court, that courts should defer to researchers' decisions about what they need for their research.

App. A:10.

This holding by the Ninth Circuit expressly conflicts with the First Circuit's ruling in *Wessman v. Gittens,* 160 F.3d 790 (1st Cir. 1998), explicitly rejecting the argument that courts should "defer[] to school officials' determinations anent the racial and ethnic composition of the student body," and holding that "constitutional principles cannot take a back seat to the discretion of local school officials in respect to matters such as the racial composition of student bodies." *Id.* at 797 n.3. The Ninth Circuit's ruling that the courts should defer to one of the litigants on a constitutional issue is shocking it its potential application.

II

THE NINTH CIRCUIT HOLDING IS NOT LIMITED TO A UNIVERSITY-RUN RESEARCH SCHOOL

Respondents raise a new point that "the Ninth Circuit's holding is expressly limited to the narrow context of a bona fide, University-run research school with the same characteristics as UES [University Elementary School]." Opposition at 12. Respondents are not able to cite any language incorporating this "express" standard. What the Ninth Circuit actually said was:

> The district court found that (1) California had a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools, and (2) UES' consideration of race/ethnicity in its

> admissions process was narrowly tailored to further that interest. *We affirm.*

App. A:3.

Thus the compelling state interest was not limited to "bona fide, University-run research school[s] with the same characteristics as UES." Rather, the state need merely claim that the school utilizing race quotas is "a research-oriented elementary school dedicated to improving the quality in urban public schools." This is a standard that could be met by any urban public school through the simple device of having some official dub it as "research-oriented" and "dedicated to improving the quality of education." (In passing, one would hope that all of the state's schools are "dedicated to improving the quality of education.") In summary, this is a standard so broad that almost any urban school could meet it and thus it is no standard at all, but a license to impose race quotas at the whim of school officials.

III

THE LOWER COURTS FOUND THAT DIFFERENT LEARNING STYLES WERE RACE-BASED

Respondents state: "Neither the court of appeals nor the district court stated that the 'different learning styles' it referred to were race-based." Opposition at 21, n.11. That would come as a surprise to those courts. The very phrase "different learning styles" came from the testimony of Professor Stipek who made clear it referred to racial differences. As noted by the dissent:

> According to Professor Stipek, one of appellees' expert witnesses at trial, "[e]thnicity is an important variable in research related to education because there is evidence that *children with different ethnic backgrounds often have different learning styles* . . . .

App. A:31 n.18 (emphasis added).

Dr. Stipek was one of the expert witnesses the Ninth Circuit relied on in reaching its holding. App. A:5 n.5. In any event, it was the Ninth Circuit and the district court who relied on the race-based "different learning styles" to justify the imposition of Respondents' race quotas. App. A:5.

IV

THE STATE MAY STUDY BUT NOT AWARD BENEFITS BASED ON RACIAL DIFFERENCES

Respondents state: "Petitioner would impose a politically-correct orthodoxy that bars publicly-funded researchers from studying questions of race and racial difference, because, she claims the Constitution effectively does not allow some questions to be asked." Opposition at 22. Respondents give no cite for this straw claim nor could they. This case is not about asking questions or studying alleged race-based differences. It is about denying the benefits of admission to a state-run school based on the applicant's race.[1] That is the issue before this Court.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari, as amplified in this reply brief, Petitioner

[1] That admission to UES is a benefit is shown by the district court's finding that the school uses the admissions process "to further the mission of UES and to advance the interests of UCLA, including recruiting faculty and staff for the University." App. C:7. That is, UCLA used admission to UES as a tool for recruiting faculty and staff through the perquisite of a superb education.

respectfully requests that this Court grant her Petition for Writ of Certiorari.

DATED: September, 2000.

Respectfully submitted,

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